

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

THEOFANIS PAPADOPOULOS, *et al.*,

Plaintiffs,

v.

FRED MEYER STORES, INC.,

Defendant.

No. C04-0102RSL

ORDER DENYING DEFENDANT'S
SECOND MOTION IN LIMINE AND
GRANTING SECTION "E" OF
DEFENDANT'S THIRD MOTION IN
LIMINE REGARDING LEE
DECHANT

I. INTRODUCTION

This matter comes before the Court on "Defendant Fred Meyer Stores' Second Motion in Limine Regarding Lee DeChant" (Dkt. #85) and section "E" of "Defendant Fred Meyer Stores' Third Motion in Limine" (Dkt. #83 at 5-6). In its second motion in limine, defendant moves to exclude, under Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993), the testimony of plaintiffs' expert Lee DeChant regarding the height of the alleged floor tile ridge in this case as unreliable. In section "E" of its third motion in limine, defendant moves to exclude Lee DeChant's testimony regarding the slope or "base angle" of the alleged floor tile ridge. The Court held a hearing on the motion on November 21, 2006 and heard testimony from plaintiffs' expert Lee DeChant and from defendant's expert Michael Mayda. See Dkt. #113. Before the

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1 hearing, the parties submitted declarations from their experts summarizing the testimony that
 2 would be presented at trial. See Dkt. #122 (Mayda Declaration); Dkt. #124 (DeChant
 3 Declaration). At the hearing, each party was given the opportunity to cross-examine the
 4 opposition's expert. For the reasons set forth below, the Court denies defendant's second
 5 motion to exclude all of Mr. DeChant's testimony and grants section "E" of defendant's third
 6 motion in limine to exclude Mr. DeChant's testimony regarding the slope of the floor tile ridge.

7 **II. DISCUSSION**

8 **A. Background**

9 On June 19, 2003 plaintiff Theofanis Papadopoulos was pushing a shopping cart in the
 10 grocery section of a Fred Meyer store in Everett, Washington. See Dkt. #114 at 2. Plaintiff
 11 claims that he fell and sustained injuries because he caught his foot on a floor tile that was
 12 elevated higher than the rest of the flooring (an alleged "ridge" in the floor tile). See Dkt. #14 at
 13 2. The height and slope of the "ridge" is an issue in the case because plaintiffs assert that the
 14 ridge was a hazardous and dangerous condition. Id.

15 Plaintiff Patricia Papadopoulos reportedly took photographs of the ridge shortly after the
 16 incident. See Dkt. #86 at 4. Using Mrs. Papadopolous' photographs, plaintiffs' expert, Lee
 17 DeChant employed photogrammetry to opine that the height of the ridge in the floor was 0.485
 18 inches and there was also a depression in the floor 0.467 inches deep. Id. at 15. Defendant
 19 contends that Lee DeChant's testimony regarding these calculations is unreliable.

20 **B. Discussion**

21 **1. Mr. DeChant's testimony regarding the height of the alleged floor tile ridge is** 22 **admissible**

23 Under Federal Rule of Evidence 702:

24 If scientific, technical, or other specialized knowledge will assist the trier of fact to
 25 understand the evidence or to determine a fact in issue, a witness qualified as an expert
 by knowledge, skill, experience, training, or education, may testify thereto in the form of

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1 an opinion or otherwise, if (1) the testimony is based on sufficient facts or data, (2) the
 2 testimony is the product of reliable principles and methods, and (3) the witness has
 applied the principles and methods reliably to the facts of the case.

3 In Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993), the Supreme Court charged
 4 trial judges with the responsibility of acting as gatekeepers to prevent unreliable expert
 5 testimony from reaching the jury. The gatekeeping function applies to all expert testimony, not
 6 just testimony based on science. See Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999). Mr.
 7 DeChant relies on the process of photogrammetry for his opinions. See Dkt. #124 at ¶14.
 8 Photogrammetry is defined as “the science of measurement from photographs.” See O.M.I.
 9 Corp. of Amer. v. Kelsh Instrument Co., Inc., 173 F. Supp. 445, 447 (D. Md. 1959) (citation
 10 omitted). The Supreme Court in Daubert outlined four factors used in determining whether
 11 expert testimony is reliable. These factors are:

12 [1] “Whether a “theory or technique . . . can be (and has been) tested”; [2] Whether it
 13 “has been subjected to peer review and publication”; [3] Whether, in respect to a
 14 particular technique, there is a high “known or potential rate of error” and whether there
 are “standards controlling the technique’s operation”; and [4] Whether the technique
 enjoys “general acceptance” within a “relevant scientific community.”

15 Kumho Tire Co., 526 U.S. at 149 (ellipsis in original) (citing Daubert, 509 U.S. at 592-94).

16 Based on these factors, the Court finds that Mr. DeChant’s testimony regarding the height
 17 of the floor tile ridge is reliable. First, Mr. DeChant’s photogrammetric measurements can be
 18 and have been tested. In his report, Mr. DeChant demonstrated that his measurement of a “9
 19 Lives” cat food can was within three thousands of an inch of the can’s actual size, and his
 20 measurement of a shelf extrusion was within six thousands of an inch of the shelf’s actual size.
 21 See Dkt. #86 at Exhibit 8 & 9; Dkt. #124 at ¶¶ 22-24. Mr. DeChant also demonstrated at the
 22 hearing that his selection of ridge points could be reliably replicated. Second, the parties in this
 23 case do not dispute that close range photogrammetry has been subjected to peer review and
 24 publication. Third, there is not a high known or potential rate of error for Mr. DeChant’s
 25 measurements. Although defendant claims that Mr. DeChant’s measurement of some of the 12”

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1 x 12" floor tiles demonstrates a high error rate, as Mr. DeChant explained at the hearing, he was
2 not attempting to mark the corners of all the floor tiles and these measurements were not used
3 individually as reference measurements. See Dkt. #85; Dkt #89 ¶¶ 5, 8, and 9. Instead, Mr.
4 DeChant used the numeric mean of 5 different floor tile vector distances and the Court finds
5 these measurements are sufficiently reliable. See Dkt. #124 at ¶19. Additionally, as mentioned
6 above, Mr. DeChant provided testimony regarding the reliability of his measurements through
7 the cat food can and shelf extrusion examples. Finally, as Mr. Mayda acknowledged at the
8 hearing, there is no dispute that close range photogrammetry enjoys general acceptance within
9 the relevant scientific community. Courts in this Circuit have previously admitted testimony
10 based on photogrammetry. See United States v. Quinn, 18 F.3d 1461, 1464-65 (9th Cir. 1994)
(affirming district court's admission of an expert's opinion based on photogrammetry).

11 Mr. DeChant's testimony also satisfies Fed. R. Evid. 702's requirements because Mr.
12 DeChant qualifies as an expert in close range photogrammetry and the testimony is reliable.
13 Due to the resolution of the photographs used by Mr. DeChant, however, the Court does have
14 some concern under Fed. R. Evid. 702(2) that "the testimony is based on sufficient facts or
15 data." As a result, at trial the Court will give plaintiffs broad discretion to present testimony
16 concerning the underlying facts and data Mr. DeChant used for his photogrammetric analysis,
17 and defendant will be given broad discretion to contest the factual foundation of Mr. DeChant's
18 testimony.

19 For these reasons, the Court finds Mr. DeChant's testimony regarding the height of the
20 floor tile ridge is sufficiently reliable to allow its admission at trial.

21 **2. Mr. DeChant's testimony regarding the slope, bevel or "base angle" is not**
22 **admissible at trial**

23 In addition to opinion testimony concerning the height of the floor tile ridge, at trial
24 plaintiffs intended to present testimony from Mr. DeChant concerning the slope, bevel or
25

1 “base angle” of the ridge. See Dkt. #124 at ¶29. This information, however, was not disclosed
 2 in Mr. DeChant’s Fed. R. Civ. P. 26 expert report dated November 11, 2005. See Dkt. #86.

3 Federal Rule of Civil Procedure 26(a)(2)(B) states that an expert report “shall contain a
 4 complete statement of all opinions to be expressed and the basis and reasons therefor[.]”
 5 (emphasis added). The rule further provides: “the parties shall further supplement these
 6 disclosures when required under subdivision (e)(1).” Fed. R. Civ. P. 26(a)(2)(C). Mr. DeChant
 7 did not include any opinions regarding the slope of the ridge in his Rule 26(a)(2)(B) report and
 8 has not provided a supplemented expert disclosure. See Dkt. #95 at 9. It was plaintiffs’ burden
 9 to produce a supplemented disclosure, not defendant’s burden to ask for one. Accordingly,
 10 because plaintiffs have not complied with Fed. R. Civ. P. 26, the Court excludes Mr. DeChant’s
 11 testimony at trial concerning the slope of the alleged floor tile ridge.

12 **III. CONCLUSION**

13 For all of the foregoing reasons, “Defendant Fred Meyer Stores’ Second Motion in
 14 Limine Regarding Lee DeChant” (Dkt. #85) is DENIED and section “E” of “Defendant Fred
 15 Meyer Stores’ Third Motion in Limine” (Dkt. #83 at 5-6) is GRANTED. The Court will allow
 16 Mr. DeChant to testify at trial about the height of the alleged floor tile ridge, but will not allow
 17 him to testify about the slope, bevel, or “base angle” of the alleged floor tile ridge.

18 DATED this 22nd day of November, 2006.

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21 Robert S. Lasnik
 22 United States District Judge
 23
 24
 25

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